

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CRUZ MEDINA

Claimant

VS.

BEEF PRODUCTS, INC.

Respondent

AND

ST. PAUL FIRE & MARINE INS. CO.

Insurance Carrier

Docket No. 1,008,583

ORDER

Respondent and its insurance carrier requested review of the October 28, 2003 Award by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on February 17, 2004.

APPEARANCES

Scott J. Mann of Hutchinson, Kansas, appeared for the claimant. Richard J. Liby of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that, by mistake, they stipulated to an accident date of May 5, 2003, instead of the correct date of March 5, 2003. Consequently, the Award will be modified to reflect the correct date of accident of March 5, 2003.

ISSUES

The nature and extent of claimant's disability was the disputed issue. The claimant argued that she suffered bilateral upper extremity injuries which entitled her to a whole body disability including a work disability (a disability greater than the percentage of

functional impairment). The respondent argued claimant had suffered only a scheduled disability to her right upper extremity. The Administrative Law Judge (ALJ) found the claimant suffered injury to her bilateral upper extremities. Consequently, she further determined claimant suffered a 49 percent work disability based on a 33 percent task loss and a 65 percent wage loss.

The respondent requests review of the nature and extent of claimant's disability including whether respondent is entitled to a credit for a preexisting functional impairment. Respondent argues that claimant's functional impairment in her left upper extremity remained the same after her current injury when compared to a preexisting functional impairment to that upper extremity. Respondent argues that because claimant did not suffer an additional permanent impairment to her left upper extremity her compensation must be limited to the undisputed 3 percent functional impairment to her right upper extremity.

In the alternative, respondent argues that if it is determined claimant suffered a whole body injury it is entitled to a credit for the preexisting functional impairment determined in a prior workers compensation claim. That prior claim was settled for a lump sum compromise settlement of all issues, including a waiver of future medical treatment and the right to review and modification. The lump sum payment was equivalent to a 10 percent permanent partial impairment to the left upper extremity. Respondent argues that preexisting upper extremity rating should be converted to a 6 percent whole person impairment and that respondent should be entitled to a credit for that percentage of preexisting impairment.

The claimant argues that she is entitled to an increased work disability because she is still unemployed and therefore the wage loss component of the work disability formula should be 100 percent instead of the 65 percent determined by the ALJ using an imputed wage. Claimant further argues respondent failed to meet its burden of proof that claimant had any preexisting impairment in her hands or wrists. In the alternative, the claimant requests the Board to affirm the ALJ's Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and after considering the parties arguments, the Board finds and concludes the October 28, 2003 Award should be affirmed. Judge Fuller set forth in detail the pertinent facts in this claim. The Board adopts the Judge's findings and analysis. In summary, the record establishes claimant suffered an additional permanent impairment to her left upper extremity and that respondent failed to establish the percentage of claimant's preexisting impairment in her left upper extremity.

Initially, the respondent argues that claimant did not suffer an additional permanent injury to her left upper extremity. Claimant had settled a previous workers compensation claim on September 29, 1999. The claimant agreed to a compromise lump sum settlement

for injuries to her left upper extremity. The medical evidence introduced at the settlement hearing included Dr. Edward J. Prostic's opinion claimant suffered a 15 percent rating to the left upper extremity and Dr. Tyrone D. Artz's opinion claimant suffered a 5 percent rating to the left upper extremity.

Respondent argues the compromise settlement was based upon a split of the two doctor's ratings or 10 percent. Respondent notes that Dr. Philip R. Mills rated claimant with a 10 percent impairment to her left upper extremity for the March 5, 2003 accident. Consequently, respondent argues that the percentage of impairment to claimant's left upper extremity is the same as determined in the previous settlement. Accordingly, respondent concludes that there has been no increase in claimant's permanent impairment to her left upper extremity as a result of the repetitive injuries concluding March 5, 2003.

Respondent's argument overlooks the fact that the previous claim was settled based upon a compromise lump sum settlement. There was no finding claimant suffered a 10 percent impairment. A review of the ratings provided for the settlement hearing indicates that Dr. Prostic's 15 percent was for "rotator cuff tendinitis and residuals of ganglion cyst excision." Dr. Artz's 5 percent left upper extremity rating was based upon recurrent excision of ganglion cysts and "as a result of some mild decreased motion and some persistent discomfort."

There is no indication in the record what percentage of Dr. Prostic's 15 percent rating was for the rotator cuff tendinitis as compared to the percentage attributable to the residuals of the ganglion cyst excision.

Respondent's argument also disregards Dr. Michael H. Munhall's opinion that as a result of the injuries suffered in the current claim, the claimant has suffered an additional 3 percent permanent partial functional impairment to each upper extremity. Although Dr. Munhall was unaware of claimant's prior settlement, when it was brought to his attention he specifically reviewed the medical records of Drs. Artz and Prostic and concluded his rating was different than their prior findings. And Dr. Munhall noted that Dr. Prostic's findings did not reference any problems with claimant's left elbow and forearm which were among Dr. Munhall's primary findings.

The ALJ adopted Dr. Munhall's opinion as the most persuasive and concluded the claimant suffered injury to the whole person. The Board agrees and affirms.

Respondent next argues it is entitled to a credit for preexisting impairment to claimant's left upper extremity. Respondent reiterates that claimant had a preexisting 10 percent impairment to the left upper extremity as established by the September 29, 1999, settlement hearing.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the later injury is an aggravation of a preexisting condition. The Act reads, in part:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. **Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.**¹ (Emphasis added).

And functional impairment is defined by K.S.A. 44-510e(a) (Furse 2000), as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body **as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment**, if the impairment is contained therein. (Emphasis added.)

Consequently, the Act requires that before an award may be reduced for a preexisting functional impairment, the worker must have a functional impairment that is ratable under the *AMA Guides*², if the impairment is contained in the *AMA Guides*. Moreover, the Act requires that the amount of the functional impairment be established by competent medical evidence.

On the other hand, the Act does not require that the preexisting functional impairment was evaluated or rated before the later work-related accident. Nor does the Act require that the worker had been given work restrictions for the preexisting condition before the later work-related accident. Nonetheless, the Act does require that the preexisting condition must have actually constituted a rateable functional impairment.

The Kansas Court of Appeals has recognized that previous settlement agreements and previous functional impairment ratings are not necessarily determinative of a worker's functional impairment for purposes of the K.S.A. 44-501(c) (Furse 2000) reduction. In *Mattucci*³, the Kansas Court of Appeals stated:

Hobby Lobby erroneously relies on *Baxter v. L.T. Walls Const. Co.*, 241 Kan. 588, 738 P.2d 445 (1987), and *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d 39, 611 P.2d 173 (1980), to support its position. In attempting to

¹ K.S.A. 44-501(c) (Furse 2000).

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

³ *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 and 83,349 (Kansas Court of Appeals unpublished opinion file June 9, 2000) (copy attached pursuant to Sup. Ct. Rule 7.04).

distinguish the facts of the present case, Hobby Lobby ignores that both Baxter and Hampton instruct that a previous disability rating should not affect the right to a subsequent award for permanent disability. *Baxter v. L.T. Walls Const. Co.*, 241 Kan. at 593; *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d at 41. Furthermore, the *Hampton* court declared that “settlement agreements regarding a claimant’s percentage of disability control only the rights and liabilities of the parties at the time of that settlement. The rating for a prior disability does not establish the degree of disability at the time of the second injury.” 241 Kan. at 593.

It is probably true claimant had a functional impairment as a result of her previous injury to her left upper extremity. But respondent and its insurance carrier failed to prove the percentage of that functional impairment. Dr. Mills merely relied upon respondent’s assertion that claimant had a prior injury to her left upper extremity which was settled for 10 percent. Dr. Mills did not examine any medical records from that prior settlement and agreed his deduction for preexisting impairment was merely based upon his understanding there was a 10 percent settlement. Dr. Munhall did not offer an opinion regarding any possible preexisting functional impairment.

Moreover, the Board notes that any preexisting functional impairment, if based upon the medical records attached to the September 29, 1999 settlement hearing, would have quite possibly emanated from a different level of the left upper extremity than the levels claimant injured on March 5, 2003. Consequently, the evidence fails to prove that the current accident aggravated a preexisting condition.

For purposes of K.S.A. 44-501(c) (Furse 2000), respondent and its insurance carrier have failed to prove the amount of functional impairment that existed in claimant’s left upper extremity before his March 5, 2003 accident or that claimant’s present functional impairment rating includes an amount representing a preexisting condition.

The burden of proving a workers compensation claimant’s amount of preexisting impairment as a deduction from total impairment belongs to the employer and/or its carrier once the claimant has come forward with evidence of aggravation or acceleration of a preexisting condition.⁴

Consequently, the award should not be reduced for a preexisting functional impairment under the provisions of K.S.A. 44-501(c) (Furse 2000).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated October 28, 2003, is affirmed.

⁴ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, Syl. ¶ 5, 11 P.3d 1184 (2000), rev. denied 270 Kan. 898 (2001).

IT IS SO ORDERED.

Dated this _____ day of February 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
 Richard J. Liby, Attorney for Respondent and its Insurance Carrier
 Pamela J. Fuller, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director